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September 13, 2005

VIA E-MAIL

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12 Street, N.W., Room 8B201
Washington, D.C. 20554

Re: Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223

Dear M. Dortch:

I am writing this letter to respond to reports that the Commission is considering eliminating, among other things, Qwest's duty to unbundle loops and transport of every type and capacity in **[proprietary begin] [proprietary end]** of the wire centers within the Omaha Metropolitan Statistical Area ("MSA") in which Cox Communications Inc. ("Cox") offers telecommunications service.[1] For the reasons explained herein, there is no basis in the record of this proceeding for the Commission to grant Qwest this extraordinary relief, and, if it did so, the Commission's decision would likely be overturned on appeal.

Section 10 of the Communications Act requires that the Commission forbear from applying a statutory provision or regulation if it determines that (1) the requirement is not "necessary" to ensure just, reasonable and not unjustly or unreasonably discriminatory charges and practices; (2) the requirement is not necessary for the protection of consumers; and (3) forbearance is in the public interest. 47 U.S.C. § 160(a). These requirements are conjunctive, so that failure to meet any of the three requires denial of a petition for forbearance. *See Cellular Telecommunications & Internet Association v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (*CTIA v. FCC*). In making a determination as to whether granting a petition is in the public interest, the Commission "shall" consider the extent to which granting forbearance will "promote competitive market conditions." 47 U.S.C. § 160(b).

[1] Although it sought forbearance from essentially all dominant carrier and ILEC-specific regulations in its petition, this letter addresses only the question of whether the Commission may or should relieve Qwest of its loop and transport unbundling obligations under Section 251(c)(3).

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Forbearing from applying the loop and transport unbundling requirements to Qwest in Omaha would be flatly inconsistent with prior Commission precedent. It is most obviously inconsistent with the FCC's treatment of Verizon Wireless' petition for permanent forbearance from number portability. In that case, the Commission concluded that implementing number portability for wireless carriers was "necessary" to protect consumers' interest in the continued development of competition among CMRS providers and between CMRS providers and wireline LECs.[2] It reached this conclusion, even though there were, on average, *six* facilities-based CMRS competitors in the major markets in which LNP would be required absent forbearance,[3] even though the FCC had determined that, at most, five percent of consumers substituted their landline service in favor of CMRS (*see id.* at 13017), and even though competition between the two was "limited." *Wireless LNP Order* ¶ 17. In addition, the Commission concluded that denying forbearance from number portability was in the public interest because number portability would promote competition. It reached this conclusion even though the record demonstrated that CMRS carrier compliance with LNP would be extremely expensive (Cingular characterized the costs as "enormous") (*id.* ¶ 11) and that forbearance would allow carriers to "focus their resources on further buildout of their networks." *Id.* ¶ 19.

Then Commissioner Martin stated in his separate statement accompanying the *Wireless LNP Order* that he "support[ed] the Commission's conclusion that our LNP rules are consistent with the protection of consumers and thus not to forbear from applying them." *See Wireless LNP Order*, Separate Statement of Commissioner Kevin J. Martin. He stated that he disagreed with the Commission's interpretation of "necessary" in Section 10 as "consistent with" or "important," and he would have preferred that the Commission interpret the term to mean "something closer to 'essential.'" *Id.* Nevertheless, Commissioner Martin stated that he agreed that the Verizon Wireless petition was properly denied so long as the interpretation of the term "necessary" adopted by the Commission applied. *Id.* That interpretation was subsequently upheld by the D.C. Circuit in *CTIA v. FCC,* and it is binding on the Commission here.

The only way for the Commission to remain consistent with this precedent is to deny Qwest's Omaha petition for forbearance entirely, but especially with regard to unbundled loops and transport. If the costly implementation of number portability was necessary to protect consumers' interest in competition and in the public interest in markets where there were on average six fully facilities-based competitors and where wireless was (and is) not a substitute for wireline service, retaining loop and transport unbundling clearly is "necessary" in the instant context. The record in this proceeding demonstrates that all of the competitors except Cox (and even Cox states that it purchases copper

[2] *See Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation And Telephone Number Portability*, 17 FCC Rcd 14972 (2002) *aff'd CTIA v. FCC*, 330 F.3d 502 ("*Wireless LNP Order*").

[3] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report, 17 FCC Rcd 12985, 12990 (2002) ("*CMRS Competition Report*").

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loops from Qwest[4]) in the Omaha market must rely on Qwest transmission facilities to compete.[5] Eliminating UNEs would likely force some of these competitors to exit the market immediately and would seriously weaken those that were to remain. This would leave only Cox as a viable competitor. As explained below, Cox does not serve business customers to any significant degree in Omaha, so business markets would be left with virtually no competition at all. Cox does serve many residential customers, but the Commission has found that a market with two competitors is not workably competitive. This is especially so in markets where (as here) entry barriers are high, products are

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[4] *See ex parte* Letter of J.G. Harrington, Counsel, Cox Communications Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-223 at 3 (filed June 30, 2005) ("*Cox June 30 ex parte*").

[5] For example, Qwest admitted in its own petition that McLeod is providing services in Omaha exclusively via UNE-P, UNE-L and resale. *See e.g.,* Time Warner Telecom Opposition, WC Dkt. No. 04-223 at 13 (filed Aug. 24, 2004) ("*TWTC Opposition*") (*citing Affidavit of David Teitzel,* ("*Qwest Affidavit*") attached as Exh. A to Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Statistical Area, WC Dkt No. 04-223 (filed June 21, 2004) ("*Qwest Petition*") ("...evidence indicates that McLeod doesn't own loops of its own. By Qwest's own assertion, in 2002 and 2003, McLeod reported all of its 'customer platform[s]' as being provisioned through UNEs or resale."); AT&T Opposition, WC Dkt. No. 04-223 at 3-4 (filed Aug. 24, 2004) ("*AT&T Opposition*") (*citing Qwest Affidavit*) ("Qwest identifies McLeodUSA as one of the key facilities based wireline providers in Omaha, while at the same time pointing out that *100%* of McLeod's service offerings rely on inputs from Qwest that would be eliminated if Qwest's petition were granted, i.e., UNE-L (65%), UNE-P (30%), and resale (5%).") (italics in original). Indeed, McLeod's own tariffs show that it is offering service in Nebraska and Iowa using only UNEs and resale. *See* CompTel/Ascent Comments, CC Dkt. No. 04-223 at 2-3 (filed Aug. 24, 2004) ("*CompTel/Ascent*"). Similarly, as several parties note, AllTel's operations in Omaha are miniscule. As AT&T notes, although AllTel is the second largest ILEC in Nebraska with nearly 275,000 lines, its CLEC operations are minute, serving approximately 20,000 total access lines *state-wide. See AT&T Opposition* at 11, *citing Qwest Affidavit* at 22; *TWTC Opposition* at 13, *citing Qwest Affidavit* at 18. There is also no indication that these lines are provisioned over AllTel's own facilities. Rather, as CompTel/Ascent notes, the FCC has determined that "AllTel provides CLEC services in Nebraska using UNE loops purchased from Qwest." *CompTel/Ascent* at 3 *citing Application of by Qwest Communications International, Inc. for Authorization to provide in-Region, InterLATA services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming,* Memorandum Opinion and Order, 17 FCC Rcd 26303 (2002). AT&T, the nation's largest competitive carrier notes that "[it] still must rely upon Qwest's special access services for the overwhelming preponderance of its high-capacity loops in the Omaha MSA, even in the portion of the Omaha MSA with the highest concentration of enterprise customer locations--downtown Omaha itself." *AT&T Opposition* at 35. AT&T's reliance on Qwest's facilities is wholly unsurprising since Qwest has noted that AT&T has only deployed loops to 6,400 buildings nationwide. *See* UNE Fact Report, jointly filed by Qwest, SBC, BellSouth and Verizon, WC Dkt. No. 04-313 *et al.*, at III-4 (filed Oct. 4, 2004). MCI is similarly situated to AT&T and there is no reason to believe that MCI provides services over its own loop facilities in Omaha to any significant degree. What can be certain is that Qwest, despite being given the opportunity to do so, has proffered no information as to MCI's facilities based deployment. Indeed, in response to the FCC's recent information request, all that Qwest could muster is that MCI is providing DS1 and DS3 *services* in Omaha, not that it had deployed any high capacity loop facilities. *See ex parte* presentation of Qwest at Tab 17, attached to Letter of Cronan O'Connell, Counsel, Qwest, to Marlene H Dortch, Secretary, FCC, WC Dkt. No. 04-223 (filed Jul. 27, 2005). In sum then, all competitive carriers in the Omaha marketplace are heavily reliant on Qwest's facilities to provide retail service to their end users; wholesale competition is miniscule or non-existent.

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relatively undifferentiated and information about competitive pricing is easily obtained and relatively uniform across the market.[6]

Moreover, Qwest cannot show that forbearance from UNEs is necessary to protect consumers and competition from the consequences of a purportedly imbalanced regulatory regime. As Qwest explains, Cox's edge in the mass market derives from its ability to offer the triple play of voice, data and video services to mass market customers. *See Qwest Petition* at 18. Cox has gained this edge through investment in its own facilities. There is no reason that Qwest cannot make the same investments. If it does so, the Commission's unbundling exemptions for newly deployed fiber-to-the-curb and other broadband networks would relieve Qwest of most of its remaining unbundling obligations. The Commission has also recently eliminated differences in the manner in which Qwest's and Cox's retail broadband internet access services are regulated by classifying Qwest's service as an information service (and eliminating *Computer II/III* requirements).[7] For all of these reasons, the denial of the *Verizon Wireless LNP* petition for forbearance sets a standard that Qwest cannot come close to meeting here.

But even if the FCC were to try to ignore this precedent (and it is hard to see how it could), it must still deny forbearance from Qwest's unbundling duties. Where a forbearance petition seeks relief for which the FCC has an established test, the FCC must at the very least review the petition under that established test or provide an adequate explanation as to why the test is no longer appropriate.[8] In other words, the record must at least support the conclusion that eliminating loop and transport UNEs here is permissible under the principles adopted in the *Triennial Review Order*[9] and *Triennial Review Remand Order*[10] or the FCC must explain why it is reasonable and consistent with the requirements of Section 10 to apply a different test here. The FCC cannot meet either precondition for eliminating loop and transport unbundling in Omaha.

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[6] *See EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, ¶¶ 150, 173, 186 (2002).

[7] *See FCC Eliminates Mandated Sharing Requirements on Incumbent's Wireline Broadband Internet Access Services*, Press Release, (rel. Aug. 5, 2005).

[8] *See AT&T Corp. v. FCC*, 236 F.3d 729, 736-737 (D.C. Cir. 2001) (overturning FCC denial of petition for forbearance from dominant carrier regulation where the FCC did not apply its traditional non-dominance analysis and failed to explain why such a departure was reasonable).

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("*TRO*"), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[10] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*").

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There is no basis in the record in this proceeding for concluding that the preconditions established for eliminating UNEs in the FCC's prior orders have been met in the **[proprietary begin] [proprietary end]** wire centers in Omaha in which Cox's network is most extensive (hereinafter referred to as the "Cox wire centers").[11] The FCC has established three circumstances in which UNEs are to be eliminated: (1) where lack of access to a UNE poses an entry barrier that is likely to make entry into a market uneconomic for a reasonably efficient competitor (*see TRRO* ¶ 22); (2) where the elimination of UNEs would yield substantial benefits in terms of advancing the policy goals of Section 706 (to encourage the deployment of advanced telecommunications capability) that outweigh the costs in terms of foregone competition (*see id.* ¶ 21); and (3) where a UNE is used exclusively to provide service in a downstream retail product market (such as CMRS or long distance) in which "robust" (*id.* ¶ 32) "sustainable" (*id.* n.180), and "enduring" (*id.*) competition has evolved without reliance on UNEs and where other factors such as the limited risk of incumbent LEC price squeezes and administrability concerns weigh in favor of eliminating unbundling (*see id.* ¶¶ 29-38, 46-65). The circumstances in Omaha do not meet any of these criteria.

First, there is no basis for concluding that the market conditions in Omaha are somehow different enough from the rest of the country that entry into the local and broadband markets is economic in the absence of DS0 loops and DS1 and DS3 loops and transport. It is important to emphasize that the relevant inquiry under the impairment analysis is whether non-ILECs are able to deploy their own facilities. While Qwest has submitted a large amount of data regarding its retail market share in this proceeding, that information is of no relevance by itself to the impairment inquiry. This is because an incumbent LEC can lose market share to competitors that have no choice but to rely on wholesale inputs from the incumbent. As explained in footnote 5 *supra*, the record demonstrates that the few non-cable CLECs in the Omaha market are in exactly this position.

No doubt recognizing this fact, Qwest relies almost exclusively on the presence of Cox in parts of the Omaha market as a basis for treating that market differently from any other market in the country. But Cox's presence in the market is insufficient to demonstrate the absence of impairment even for serving residential customers. The Commission has held that a competitive carrier that has "advantages as a result of its unique circumstances" is essentially irrelevant to the impairment analysis, because there is no reason to think that other competitors could succeed without those advantages. *See TRRO* ¶ 26; *TRO* ¶ 98. Cable operators like Cox possess such unique advantages, because they deployed transport and loop facilities for the purpose of providing video service to residential customers when they enjoyed monopoly status and can then use those same facilities (incrementally upgraded in some cases) to provide broadband and telephone services. Thus, Cox's reliance on its own hybrid fiber-coaxial loops to provide voice service in the Omaha territory does not support the conclusion that other competitors could deploy their own loops to serve residential customers.

There are even more fundamental problems with attempting to rely on Cox's presence in the market to show lack of impairment in business markets. To begin with, the Commission has found that the impairment analysis must be assessed separately for transmission facilities of different capacities

[11] The Cox wire centers are as follows: **[proprietary begin] [proprietary end]**.

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(DS0, DS1, DS3, OCn, etc.). *See TRRO* ¶¶ 86, 166-181. This is because the revenue opportunities vary substantially from one level of capacity to another while the costs of deploying transmission facilities do not. *See id.* ¶ 86. But the data supplied regarding business customers served by Cox is not disaggregated by loop or transport facility capacity. Customers served by facilities of OCn level capacity, for which the FCC has already found no impairment and that are therefore irrelevant to the analysis, are lumped together with customers served via coaxial cable connections. It is simply impossible to determine the extent to which Cox is able to deploy its own loops and transport of relevant capacity levels (i.e., DS0, DS1 and DS3).

But even if one overlooks this fundamental problem, there is enough evidence in the record to demonstrate that Cox has not and probably will not deploy transmission facilities of any capacity to serve the vast majority of the business customers in its Omaha MSA service territory. Indeed, the situation in Omaha confirms the Commission's prior holdings that **[proprietary begin][proprietary end]** [12]

Moreover, it is not at all clear what Cox means when it states that its network "covers" certain businesses in its service territory. In particular, it is not clear how widely Cox can offer DS-1 or DS-3 end user connections to businesses even within the area that its network "covers." It is apparent from the Cox promotional materials submitted by Qwest in the record that Cox markets DS1 and DS3 service to businesses. *See infra* note 13. But the mere existence of promotional materials and general descriptions of DS1 and DS3 level service offerings is insufficient to establish that a cable operator can actually deploy a loop of a particular capacity throughout an area. In the TRRO proceeding, Qwest and BellSouth both argued that this type of evidence was enough to justify a finding of non-impairment, but the FCC squarely rejected that argument. *See TRRO* ¶ 193, nn. 508, 509. The Commission concluded that there is "little evidence that cable companies are providing service at DS1 or higher capacities." *Id.* ¶ 193.

Qwest has not offered any basis for revisiting this conclusion in Omaha. To the extent that Cox offers DS1 and DS3 services at all in Omaha, it likely does so over newly deployed fiber loops. As Qwest stated in the *TRRO* proceeding, "DS1 and DS3 services . . . are typically provided [by cable operators] by using fiber-optic facilities from an appropriate location in the operator's HFC (hybrid-fiber cable) distribution network."[13] The Cox business service promotional materials on the record in this proceeding indicate that Cox does provide its higher capacity services such as DS1 and DS3 service over fiber loops.[14] In order to deploy fiber loops for this purpose, Cox would face the same entry

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[12] *See ex parte* presentation at 12, attached to Letter of J.G. Harrington, Counsel, Cox Communications Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-223 (filed May, 16, 2005) ("*Cox May 16 ex parte*").

[13] Reply Comments of Qwest, WC Dkt. No. 04-313 *et al.*, at 63 (filed Oct. 19, 2004).

[14] For example, the Cox business service promotional brochure attached to the Teitzel affidavit submitted with Qwest's Petition for Forbearance invites customers to "[c]hoose Cox Business Internet for access speeds that blow away DSL. Or choose fiber-based Cox Optical Internet with bandwidth scalable up to OC12 in capacity." *See Qwest Affidavit*, Exh. A, Attachment 3, page 2. Cox apparently offers Business Internet service over its hybrid coaxial-fiber network. The fact that Cox claims that its Business Internet service offers speeds that "blow away DSL" shows that Cox believes that its Business

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barriers that other CLECs face. The Commission has concluded that such entry barriers prevent the deployment of fiber loops for the provision of DS-1 and DS-3 loops in the vast majority of circumstances (*see TRRO* ¶ 166), and there is nothing in the record in this proceeding that indicates that this conclusion is inapplicable to the Omaha market.

In order to confirm that competitors are not more able to construct loop facilities to serve business customers in Omaha than is the case in the rest of the country, the CLEC signatories to this letter asked GeoResults to provide a list of the commercial buildings served by any type of CLEC loop facility -- either one purchased from a wholesaler like Qwest or one constructed by the CLEC itself -- in the **[proprietary begin] [proprietary end]** Cox wire centers. GeoResults determined the total number of commercial buildings in the **[proprietary begin] [proprietary end]** Cox wire centers by analyzing Telcordia Common Language data products.[15] GeoResults then determined the number of those buildings served by CLECs generally, and Cox in particular. GeoResults' study determined that there are **[proprietary begin] [proprietary end]** commercial buildings in the **[proprietary begin] [proprietary end]** Cox wire centers, that CLECs serve **[proprietary begin] [proprietary end]** of those buildings using either their own loops, loops purchased from Qwest or some other wholesale provider, and that Cox serves **[proprietary begin] [proprietary end]** of those buildings. Even if one assumes that Cox uses its own facilities to serve all of these buildings, the GeoResults study shows that Cox has been able to construct loops to serve **[proprietary begin] [proprietary end]** *of the commercial buildings in the Cox wire centers.*

The data in the record regarding Cox's share of the business market further confirms its limited presence in this market. Cox states that it provides service to **[proprietary begin] [proprietary end]** voice grade equivalent connections to businesses in Omaha. *See Cox May 16 ex parte* at 13. As Cox points out, the number of business "access lines" it serves "is significantly smaller [than the number of voice grade equivalents] because this number includes T-1s and PRIs, converted into an equivalent number of POTs lines." *Id.* Indeed, it is safe to assume that **[proprietary begin] [proprietary end]** voice grade equivalents in the business market translates to far fewer than **[proprietary begin] [proprietary end]** access lines. For example, a T-1 line would connect as 24 voice grade equivalents. Moreover, as Qwest states, Cox advertises business line services of much higher capacity than T-1s, including OCn level connections. *See supra* note 13. If each of these connections is counted as only

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Internet service is in the same product market as "DSL," by which Cox almost certainly means ADSL. ADSL is generally not perceived as a substitute for DS-1 service because it offers less capacity and fewer features demanded by business customers. It appears that the "fiber-based Cox Optical Internet" services include services like DS1 and DS3 service that deliver higher levels of capacity than the Business Internet service. This seems to confirm that Cox provides DS1 and DS3 service over fiber loops.

[15] As Verizon argued in the TRRO docket only a year ago, GeoResults data "are recognized as an industry standard by numerous national and international telecommunications standards-setting bodies," and can be used to "identify and locate buildings...that are served by [CLEC] fiber-enabled network equipment" to create a "unique summary of building locations to which carriers have provisioned fiber-enabled equipment." Declaration of Verses *et al.*, ¶¶ 22-4 attached to Verizon Comments, CC Dkt. No. 01-338 *et al.*, (filed June 15, 2004).

one access line, it confirms that Cox likely serves **[proprietary begin] [proprietary end]** business access lines in the wire centers Qwest serves in Omaha.[16]

Finally, there is no basis for concluding that the Commission can rely on the continued availability of special access as a basis for meeting the requirements of Section 10. Most obviously, Qwest does not offer stand-alone copper loops as special access, so the elimination of DS0 UNE loops would leave competitors without any wholesale alternative from the incumbent and such facilities are not available from non-ILEC wholesale sources. Qwest offers DS1 and DS3 loops and transport as special access, but the FCC concluded that such special access facilities do not constitute an adequate substitute for unbundled DS1 and DS3 loops and transport (*TRRO* ¶ 46) and that reliance on special access without UNEs in markets where competitors are impaired poses "grave risks to competition." *Id.* ¶ 59. It reached this conclusion based on its findings that, among other things, incumbents "have substantial incentives to raise prices to levels close to or equal to the associated retail rate, creating a 'price squeeze'" and that neither existing special access regulation nor the "Act's general provisions designed to guard against anticompetitive behavior are sufficient to protect competitive carriers against potential abuses" by the incumbents. *Id.* ¶ 62. Indeed, as the FCC noted, it relied on the continued availability of UNEs as a basis for concluding that its extremely permissive rate regulation for special access was reasonable. *See id.* n.167.

Second, there is no basis for concluding that eliminating loop and transport UNEs in Omaha would somehow advance the policy goals of Section 706 to any significant degree, let alone enough to outweigh the costs of foregone competition. To begin with, eliminating unbundled DS1 and DS3 transport in Omaha would affirmatively harm the deployment of advanced services. It would simply deprive competitors in the broadband market the ability to obtain needed transmission inputs along those routes on which self-deployment is not economic.

Eliminating all unbundled loops in the Cox wire centers in Omaha would be even more harmful to the deployment of broadband. As mentioned, copper loops can only be obtained as wholesale unbundled network elements. The removal of unbundled DS0 loops would eliminate any hope that competitors other than Cox could compete in the provision of xDSL services demanded by mass market and even small business customers. Moreover, as discussed, to the extent that there is any concern regarding differential regulatory treatment between Qwest and Cox in the mass market, Qwest is free to upgrade its network and receive the benefits of the broadband unbundling exemptions. Finally, the harm to Section 706 policy goals would be most severe for business customers since, as demonstrated, Cox does not offer service to those customers to any significant degree. Eliminating DS0, DS1 and DS3 loops would essentially allow Qwest to re-monopolize the small and medium business markets in Omaha.

Third, robust, sustainable and enduring competition has not developed without UNEs in any of the relevant markets in Omaha. The only markets in which competition has met these standards are those

[16] *See ex parte* presentation at 4, attached to Letter of Cronan O' Connell, Qwest, to Marlene H. Dortch, Secretary, FCC WC Dkt. No. 04-223 (filed June 16, 2005).

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in which *multiple* competitors have entered and sustained a profitable, flourishing competitive presence in a downstream retail market without reliance on UNEs.[17] This is the case with the CMRS market, and it is the case with the long distance market.[18] This is not the case in Omaha, since only Cox appears to have establishing a flourishing competitive presence in a downstream retail market (retail voice and data) without reliance on UNEs. Even in the residential market, this level of competition does not meet the established standard for robust, sustainable and enduring competition. One competitor is not enough to protect consumers.

Nor does the Commission's treatment of line sharing support elimination of even DS0 loops in the Omaha Cox wire centers. Importantly, the Commission did not eliminate line sharing in the *Triennial Review Order* because competition in the provision of downstream retail mass market broadband services was adequately robust, sustainable and enduring. *See TRO* ¶ 263 ("cable modem's lead in broadband deployment is not dispositive in our impairment analysis [of line sharing])." This was obviously because competition from a cable company alone would not, by itself, be sufficient to justify the elimination of UNE-based competition. Thus, the FCC eliminated line sharing because it concluded that UNE-based broadband competition could be achieved through more administratively efficient means, namely by allowing competitors to lease unbundled stand-alone DS0 loops and by requiring incumbents to allow competitors to engage in line splitting. *See id.* ¶¶ 258-260. Eliminating stand-alone unbundled DS0 loops in Omaha would therefore be utterly inconsistent with the Commission's treatment of line sharing in virtually identical factual circumstances. Indeed, the only difference in Omaha is that Cox competes by providing voice service, but that is a distinction of no relevance. If competition from cable in a downstream retail market had been enough on its own to justify elimination of UNEs used to provide service in the downstream market, the Commission would have eliminated the availability of unbundled DS0 copper loops to serve customers that receive only mass market broadband service. It did not. Similarly, it cannot justify eliminating DS0 loops in Omaha based on Cox's competitive presence in the downstream retail mass market voice market.

In sum, forbearing from loop and transport Section 251(c)(3) unbundling in Omaha would be inconsistent with the principles underlying the prior unbundling orders. Nor could the FCC reasonably conclude that there is some other basis for determining that continued availability of unbundled loops and transport is not "consistent with" or "important" to the protection of consumers and does not "promote competitive market conditions" in Omaha. This is true in the residential market since eliminating UNEs would reduce the number of possible competitors to two, and it is true in the business markets since eliminating UNEs would reduce the number of possible "competitors" essentially to one -- Qwest. The problem in the business market is especially severe, because the FCC would essentially be forced to rely on a predictive judgment that Cox would enter the business market much more aggressively and serve business customers more widely than it has thus far. Yet there is no basis for concluding when, if ever, this might come to pass. In the meantime, consumers would be exposed to the increased market power of the incumbent. Moreover, it is hard to see why it would not

[17] *See TRRO* ¶ 3; *CMRS Competition Report* at 13066; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 ¶ 70 (1995).

[18] The FCC has found that numerous established carriers compete in the CMRS and long distance markets.

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be less harmful to consumers to wait until a higher level of competition develops in the business market than there is now before eliminating unbundling. Based on Cox's aggressive business plans in the residential market and its success in gaining market share therein while Qwest's unbundling duties have remained in place, it is clear that retaining unbundling requirements has little or no effect on the development of facilities-based competition. The obvious implication is that consumers are more effectively protected by waiting to see if facilities-based competition develops and exercising forbearance if it does.

In sum, the Commission should deny the Qwest petition for forbearance for Omaha in its entirety.

Sincerely,

Thomas Jones

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Conversent Communications, Covad Communications,
CTC Communications Corp., Time Warner Telecom Inc.,
and XO Communications Inc.

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